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Supreme Court, U.S.
FILED
SEP 28 1988
JOSEPH F. SPANIOL, JR.
CLERK

NO. 87-1954

IN THE
SUPREME COURT
OF THE UNITED STATES

October Term, 1987

THE CONSOLIDATED CITY
OF JACKSONVILLE,
DUVAL COUNTY, FLORIDA,
a municipal corporation,

Petitioner,

vs.

WINSTON NASH,

Respondent.

On Petition For Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTIONS ADDRESSED IN THIS SUPPLEMENTAL BRIEF

1. Whether the Eleventh Circuit's imposition of a burden of persuasion upon the employer, in a Title VII "disparate impact" case, conflicts with the proper burden of production standard set forth by the Third Circuit in *NAACP v. Medical Center, Inc.*, 657 F.2d 1322 (3rd Cir. 1981), and a plurality of this Court in *Watson v. Fort Worth Bank and Trust*, 487 U.S. __, 101 L. Ed. 2d 827, 108 S.Ct. __ (1988)?

3. Whether the Eleventh Circuit erred when it limited the type of evidence it considered to be legally sufficient to prove job-relatedness?

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FILING STATEMENT

This Supplemental Brief is filed pursuant to Rule 22.6 of the Rules of the United States Supreme Court and directs the Court's attention to its recent decision in *Watson v. Fort Worth Bank and Trust*, 487 U.S. ____, 101 L.Ed.2d 827, 108 S.Ct.____(1988), which squarely addresses the first and third issues raised in the Petitioner's pending Petition for Writ of Certiorari. The Court decided *Watson* on June 29,

1988, subsequent to Petitioner's filing of its Petition for Writ of Certiorari on May 27, 1988.

All references to *Nash v. Consolidated City of Jacksonville,* 763 F.2d 1393 (11th Cir. 1985), will be as *Nash I.* All references to *Nash v. Consolidated City of Jacksonville,* 837 F.2d 1534 (11th Cir. 1988), will be as *Nash II.*

REASONS FOR GRANTING CERTIORARI

I

THE ELEVENTH CIRCUIT'S IMPOSITION OF A BURDEN OF PERSUASION UPON THE EMPLOYER CONFLICTS WITH THE BURDEN OF PRODUCTION STANDARD SET FORTH BY THE THIRD CIRCUIT AND THE SUPREME COURT IN *WATSON V. FORT WORTH BANK AND TRUST.*

In an unanimous decision, in *Watson v. Fort Worth Bank and Trust*, 487 U.S. ____,101 L.Ed. 827, 108 S.Ct.____ (1988), this Court expanded the application of disparate impact analysis to subjective employment criteria. A significant supplemental consequence of the *Watson* decision is that a plurality of this Honorable Court specifically determined that the burden of persuasion never shifts to an employer in disparate impact analysis. The reasoning advanced by the *Watson* plurality is similar to the position set forth in the City's petition in support of a grant of certiorari. The plurality concluded:

> "Nor do we think it is appropriate to hold a defendant liable for unintentional discrimination on the

> basis of less evidence than is required to prove intentional discrimination."

Watson, 101 L.Ed.2d 827, 840.

The City cited in its petition the Third Circuit's reasoning, in *NAACP v. Medical Center, Inc.*, 675 F.2d 1322, 1335, which criticized as "illogical" an interpretation, as stated by the Eleventh Circuit in *Nash*, imposing a stricter standard upon an employer in the disparate impact cause of action than in the intentional discrimination Title VII cases. See City's Petition for Writ of Certiorari at page 12-13. If the Eleventh Circuit had followed the Third Circuit's rationale (which was effectively approved by the *Watson* plurality) and had applied the proper burden of persuasion in both *Nash I and II*, then the judgments of the District Court would have been affirmed and the City would have correctly prevailed.

The *Watson* plurality reaffirmed the previous holdings of this Court, that while the factual issues in disparate impact cases differ from the disparate treatment context, the ultimate legal issue of discrimination is not distinguishable in any of the

Title VII cause of actions. Furthermore, the ultimate burden to prove discrimination does not shift from the employee:

> ". . . Although we have said that an employer has 'the burden of showing that any given requirement must have a manifest relationship to the employment in question,' *Griggs*, 401 U.S., at 432, such a formulation should not be interpreted as implying that the ultimate burden of proof can be shifted to the defendant. On the contrary, the ultimate burden of proving that discrimination against a protected group has been caused by a specific employment practice remains with the plaintiff at all times."

Watson, 101 L.Ed.2d 827, 847.

The Eleventh Circuit's holdings in both *Nash I* and *II* are explicitly to the contrary. The Eleventh Circuit, in the case at bar, improperly shifted the burden of proof to the employer on the ultimate issue of discrimination:

> ". . . But this is not the rule of the above cases, or any others, in an 'impact' situation involving employment tests under Title VII. It is the rule in intent cases only. The Court in *Burdine*, 450 U.S. at 252 n. 5,

> 101 S.Ct. at 1093 at n. 5, expressly distinguishes the 'impact' situation. In an 'impact' case the employer must do more than 'articulate'. He bears the burden of proving or 'persuasion', that the examination was a 'business necessity'. (citations omitted)
>
> "The idea seems to be that mere 'articulation' shifts the burden back to plaintiff to persuade that the test is discriminatory, but this is contrary to the authorities in this circuit as to 'impact' employment test cases that we have cited."

Nash I, 763 F.2d 1393, 1397-1398.

After a prima facie case of disparate impact is made, the plurality in *Watson* requires the employer to meet this burden by producing evidence that its employment practices are based on legitimate business reasons. The employee's obligation to persuade the court of the ultimate fact of discrimination does not shift.

The District Court below twice found the City had met this production threshold. Most importantly, in *Nash I*, even the Eleventh Circuit found the City had produced evidence of legitimate

business reasons:[1]

> "It is true that defendant, in its testimony, went much beyond mere 'articulation,' and the court recited this testimony with every indication of believing it . . ."

Nash I, 763 F. 2d 1393, at 1397.

Nevertheless, after *Nash* established his prima facie showing of disparate impact, the Eleventh Circuit, in both *Nash I* and *II*, erroneously shifted the burden of persuasion to the City.

Once the employer has met its burden of producing evidence, the *Watson* plurality held that the Plaintiff is required to show that other selection devices would produce less impact while serving the legitimate business interests of the employer. A plaintiff can also prove that the neutral selection criteria was not manifestly related to the job. These are weight and credibility determinations for the trial court.

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1 The Eleventh Circuit in *Nash II* surprisingly rejected the legal sufficiency of the evidence which was the identical evidence as in *Nash I*. After *Nash I*, Nash did not move for a trial *de novo* and the evidence from the original trial was submitted to the Trial Court for further judgment. See Appendix to Petition for Writ of Certiorari at A-60, 62, 65.

In *Nash II*, the District Court specifically found that Nash had not sufficiently rebutted the City's production of legitimate business reasons:

> "Neither is the Court persuaded that other less discriminatory alternatives were available, but not used. To the contrary, evidence was submitted, albeit by the Defendant, that alternative methods historically were used and/or considered, but were not used in this case for legitimate reasons. In fact, in this courts [sic] opinion, such alternative methods would have afforded Defendants more of an opportunity to discriminate against blacks."

See Appendix to Petition for Writ of Certiorari at A-35. Therefore, the City would have prevailed on appeal if the correct burden of persuasion had been used.

In *Watson*, the plurality intended to explicitly enunciate the appropriate evidentiary guidelines applicable to disparate impact cases. The *Watson* plurality concluded that the high standards of proof applicable in the facially neutral context would guard against an employer's use of arbitrary

quotas to shield itself from potential unfounded discrimination claims. The plurality declared:

> ". . . In sum, the high standards of proof in disparate impact cases are sufficient in our view to avoid giving employers incentives to modify any normal and legitimate practices by introducing quotas or preferential treatment."

Watson, 101 L.Ed.2d 827, 848.

The *Watson* Court's minority disagreed with the plurality's interpretation and held that a more stringent burden is applicable in a facially neutral context than in an intentional discrimination case. Justice Kennedy did not take part in *Watson* and Justice Stevens deferred discussion concerning the appropriate evidentiary standards until such facts are before the Court. The granting of certiorari herein would provide this Honorable Court with the opportunity to freshly announce the proper allocations of proof and provide the lower courts with further guidance on this issue.

The City of Jacksonville respectfully requests that this Honorable Court grant certiorari in view of

the plurality's opinion in *Watson* setting forth evidentiary standards in disparate impact cases in which are contrary to the Eleventh Circuit's decisions below.

III

THE ELEVENTH CIRCUIT ERRED WHEN IT LIMITED THE TYPE OF EVIDENCE IT CONSIDERED TO BE LEGALLY SUFFICIENT TO PROVE JOB-RELATEDNESS.

In *Watson*, the plurality reviewed the type of evidence legally sufficient to support a finding of an examination's job-relatedness. The restrictive approach taken by the Eleventh Circuit in *Nash* contrasts with the *Watson* plurality's view. The plurality reiterated the broad evidentiary alternatives available to the employer and specifically held:

> "Our cases make it clear that employers are not required, even when defending standardized or objective tests, to introduce formal 'validation studies' showing that particular criteria predict actual on-the-job performance."

Watson, 101 L.Ed.2d 827, 847.

In *Nash II*, the Eleventh Circuit erroneously concluded that the evidence introduced at trial, which included the test formation methodology coupled with Nash's admissions of job-relatedness, was legally insufficient to establish job-relatedness

and to rebut a showing of disparate impact.[2] The Eleventh Circuit's ruling below is contrary to the *Watson* opinion quoted above:

> "Job-relatedness can be established through the testimony of expert *witnesses supported* by a *validation study*. (citations omitted) In this case, however, there was no validation study conducted by an expert. *Without the test itself* and with *no testimony presented by the defendant regarding job-relatedness of the questions*, there was no way for the district court to conclude that the questions were job related." (emphasis added)

Nash II, 837 F.2d 1534, 1537-1538.

The plurality in *Watson* further reaffirmed the principle that employers do not have to demonstrate that their objective tests predict ability

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[2] This contradicted the Eleventh Circuit's own holding in *Nash I* wherein they found the City *had* produced sufficient evidence of legitimate business reasons. *Nash I*, 763 F.2d 1393, 1397. Again, the *identical* evidence was before the Eleventh Circuit in both *Nash I and II*. See Appendix to Petition for Writ of Certiorari at A-60,62,65. Thus, the unavoidable inference to be drawn is that the Eleventh Circuit reweighed the evidence in violation of the clearly erroneous standard. See City's Petition for Writ of Certiorari, Pages 14-21.

to perform on the job. In support of this point, the plurality cited *Washington v. Davis*, 462 U.S. 229, 250, wherein this Court held the job-relatedness requirement was satisfied when the employer showed that an examination was related to success at a police training academy without a demonstration the test would predict future job performance.

The District Court, in *Nash II*, concluded that the examination, developed by qualified experts with past and current fire lieutenant experience and taken from relevant materials used to train fire lieutenants, was directly related to job performance in accordance with this Honorable Court's decisions. The District Court specifically found:

> "The test was developed by experts in the field from available materials directly related to job performance and to the knowledge required. Neither its administration, nor action taken upon the results, was designed, intended or used to discriminate on the basis of race.
>
> "This Court finds that the 1981 examination was 'appropriate for the selection of qualified applicants for

> the job in question'. *Washington v. Davis*, 426 U.S. 229, 247 (1976).*

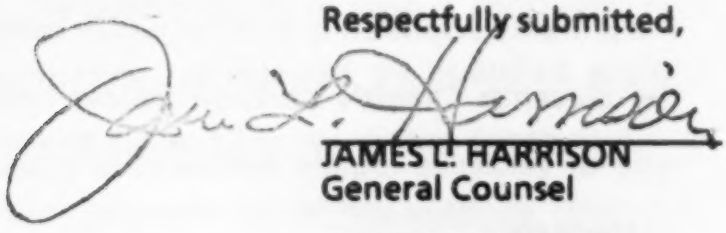
See Appendix to Petition for Writ of Certiorari at A-33. Therefore, the City would have prevailed on appeal if the correct interpretation of the type of evidence necessary to establish job-relatedness had been used.

The City of Jacksonville respectfully requests that this Honorable Court grant certiorari in view of the plurality's opinion in *Watson* which conflicts with the Eleventh Circuit's decision below limiting the type of evidence legally sufficient to establish job-relatedness.

CONCLUSION

For all the above and foregoing reasons, Petitioner prays that this Court grant a Petition for a Writ of Certiorari in order to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit in *Nash v. Consolidated City of Jacksonville, supra*.

Respectfully submitted,



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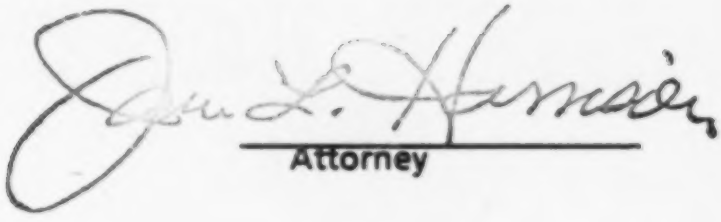
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies hereof have been furnished to WINSTON NASH, Respondent herein, 7948 Jeff Drive, Jacksonville, FL 32244, by United States mail, this 28th day of September, 1988.



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